VERNON C. HOWELL

IBLA 77-22 Decided April 18, 1977

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting oil and gas lease offer ES 13579.

Affirmed.

1. Mineral Leasing Act for Acquired Lands: Generally ! ! Oil and Gas Leases: Acquired Lands Leases ! ! Oil and Gas Leases: Applications: Generally ! ! Oil and Gas Leases: Future and Fractional Interest Leases

   An oil and gas lease offer for acquired lands in which the United States owns a fractional mineral interest, filed before October 28, 1976, must have been accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States. An offer which was defective for failure to comply with this mandatory regulation must be rejected where it was filed in the simultaneous drawing procedure.

2. Oil and Gas Leases: Applications: Drawings

   A first ! drawn simultaneous drawing entry card which is defective because of non ! compliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Vernon C. Howell appeals from the October 4, 1976, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting noncompetitive acquired lands oil and gas lease offer ES 13579. Appellant's offer was drawn first in a drawing of simultaneously filed offers for the subject parcel on February 19, 1974. The list of land available for leasing which had included the subject parcel indicated that the United States held only a 50 percent interest in the oil and gas rights.

Appellant remitted the first year's rental on time for the oil and gas lease offer.

In answer to an inquiry by appellant, the BLM on June 19, 1974, informed him that the issuance of the lease was dependent upon the preparation of an environmental statement as required by the National Environmental Policy Act of 1969, and an environmental analysis would be made to determine whether such statement is required. The BLM informed appellant in their letter of July 25, 1974, that the environmental analysis would be prepared by the U.S. Forest Service. By letter dated March 26, 1976, the U.S. Forest Service gave their consent to the issuance of a lease.

On October 4, 1976, the Eastern States Office, BLM, issued a decision rejecting appellant's oil and gas lease offer for failure to comply with 43 CFR 3104.4. Where the U.S. owns only a 50 percent interest in the oil and gas rights at the time of the drawing, each applicant was required to submit a statement indicating the extent of any interest held in the non!federally owned fraction. The statement was required by 43 CFR 3130.4-4 (1975), amended, 41 F.R. 43149 (September 30, 1976) 1/ which provided as follows:

> An offer for a fractional present interest noncompetitive lease must be executed on a form approved by the Director and it must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected. [Emphasis supplied.]

1/ Amendments of the regulations governing fractional interest leases, including 43 CFR 3130.4-4, were published on September 30, 1976, 41 F.R. 43149. The new provision makes no express requirement for a statement of interest in the ownership of the nonfederally owned fraction.

Appellant concedes he did not submit the required statement with his drawing entry card; however, in his Statement of Reasons he urges the repeal of 43 CFR 3104.4, effective on October 28, 1976, should be applied retrospectively to those cases before the Board where the drawing took place prior to the effective date of the repeal.

[1] Recently the Board ruled on a case with essentially the same fact pattern as the case at hand. In Duncan Miller, 29 IBLA 1 (1977), the Board explained that when a drawing entry card offer is deemed to be disqualified under regulations in effect on the date of the drawing, the offer must be rejected notwithstanding any future changes in the regulations, because an oil and gas lease may only be issued to the first qualified applicant. 30 U.S.C. § 226(c) (1970); 43 CFR 3112.4-1. Subsequent curative action cannot change the loss of priority in view of conflicting offers and the special procedures established for the simultaneous filing drawing. Duncan Miller, supra; Frank G. Wells, 28 IBLA 113 (1976). The Board has repeatedly emphasized the requirements of 43 CFR 3130.4-4 (1975) requiring an offer to be accompanied by a statement showing the extent of the offeror's ownership of the operating rights in the fractional mineral interest not owned by the United States to be mandatory. Where there is no such accompanying statement, the offer must be rejected. Duncan Miller, supra; Grady Argenbright, 27 IBLA 24 (1976); Michael Shearn, 24 IBLA 259 (1976).

[2] In his brief appellant contends that the rights of other parties or the United States would not be adversely affected by a decision in his favor, since the cards drawn second and third for this parcel contain the same defect as his own.

The pertinent regulation requires that if all the successful drawees are unqualified to receive the lease for any reason the lands shall be included in a new drawing. 43 CFR 3112.5-1.

In a recent case, Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), 2/ the Board, in considering a similar contention, referred to the regulation and stated:

> Under the simultaneous filing procedure for lands to be leased noncompetitively, all offers for the same land are considered to have been filed simultaneously, and priorities are determined by a drawing. If the first drawn offer is not acceptable by reason of some failure to comply with the regulation it cannot be accorded a priority as of the time it was officially filed. The next drawn offer in acceptable form earns priority as of the date and time of the simultaneous filing, and that offeror is first qualified

2/ Aff'd, B.E.S.T., Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

as a matter of law to receive the lease. See 43 CFR 3112.2-1(a)(3); 43 CFR 3112.4-1; McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Duncan Miller, 17 IBLA 267, 268 (1974).

> Under the simultaneous filing procedure it would be utterly pointless to allow the applicant whose defective offer is first drawn additional time to cure the defect, because he could not possibly gain priority over the next drawn offer which was regular on its face. The present procedure requires that three offers be drawn for each parcel. If the first drawn offer is unacceptable for any reason, the second drawn offer gains priority as of the date and time the offers were simultaneously filed. If the second offer is then found to be unacceptable, the third offer gains first priority. If none of the three offers are acceptable as filed, the parcel must be listed for a subsequent simultaneous filing. 43 CFR 3112.5-1.

Therefore appellant's offer was properly rejected despite the fact that the junior drawees may also be unqualified.

Therefore pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge